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Nos. 81-2147 and 81-2188
(Consolidated)

In The
Supreme Court of the United States
October Term, 1982

STATE OF ARIZONA, et al.,
Petitioners,

vs.

SAN CARLOS APACHE TRIBE OF ARIZONA, et al.,
Respondents.

STATE OF MONTANA, et al.,
Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS STATE OF MONTANA et al. in No. 81-2188

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QUESTIONS PRESENTED FOR REVIEW

1. Do the disclaimer provisions in Montana's Enabling Act and Constitution deprive the Montana state courts of jurisdiction to adjudicate Indian and other federal reserved water rights?

2. Do the Montana state courts have jurisdiction to adjudicate Indian and other federal reserved water rights under the McCarran Amendment, when there has been no compliance with the pprocedures established in 25 U. S. C. § 1322?

3. Did the Montana District Court correctly hold that the McCarran Amendment and considerations of "wise judicial administration" as defined in *"Akin"* require adjudication of all water rights in Montana's comprehensive adjudication proceedings rather than in piecemeal federal actions?

Parties to 81-2188

The petitioners are the State of Montana and hundreds of private petitioners who are listed in Pet. App. 1-22.[1] The statement required by Rule 28.1 of the Rules of the Supreme Court of the United States appears in Pet. App. 23-25.

Each petitioner was a party to one or more of the cases decided by the Ninth Circuit in *Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation v. Adsit*, 668 F. 2d 1080 (February 22, 1982) (*"Adsit"*).

The respondents are: the United States of America, the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, the Crow Tribe of Indians, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and James Bowen, all appellants in the Ninth Circuit cases consolidated with *Adsit*.

Only the parties referenced above actively participated in the proceedings before the Ninth Circuit Court of Appeals. The complaints and amended complaints filed in the district court set forth the names of all parties in the seven cases. J. A. 15a, 33a, 47a, 82a, 110a, 119a, 133a.[2]

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[1]Hereinafter, all references to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari filed by the State of Montana, et al. in No. 81-2188.

[2]All references to "J. A." are to the Joint Appendix, Volume II, filed by the State of Montana, in No. 81-2188.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 668 F. 2d 1080 (1982) (Pet. App. 26-50). A subsequent order clarifying opinion (Pet. App. 51-52) is incorporated in the opinion as reported. The district court opinion issued by Judges Hatfield and Battin is reported at 484 F. Supp. 31 (D. Mont. 1979) (Pet. App. 53-61).

JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1982. The petition for a writ of certiorari was timely filed with this Court on May 21, 1982. On October 4, 1982, certiorari was granted in this petition, together with the petition for certiorari filed in the case of *Arizona, et al. v. San Carlos Apache Tribe of Arizona, et al.*, No. 81-2147, and the two cases were consolidated (J. A. 154a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved in this case, and are reproduced as part of the appendix to this brief:

1. The Enabling Act of Montana of February 22, 1889, 25 Stat. 676 [excerpt].

2. MONTANA CONSTITUTION, Ordinance No. 1 (1889) [excerpt].

3. MONTANA CONSTITUTION, Article I (1972).

4. MONTANA CONSTITUTION, Article IX, Section 3 (1972) [excerpt].

5. The McCarran Amendment, Act of July 10, 1952, 66 Stat. 560, 43 U. S. C. Section 666.

6. Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. § 1322, Public Law 280.

7. Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. § 1324, Public Law 280.

8. Act of October 10, 1966, 80 Stat. 880, 28 U. S. C. § 1362.

Two relevant sections of Senate Bill 76 which were amended by 1981 Mont. Laws, Ch. 268 §§ 4, 8, are also reproduced as part of the appendix to this brief.

Senate Bill 76, Laws of Montana (1979) Chapter 697 is reproduced in Pet. App. 102-132. The Montana Water Use Act, Laws of Montana (1973), Chapter 452, § 89-865-899, § 89-8-100, § 89-8-111, R. C. M. (1947), is reproduced in Pet. App. 62-101.

Additionally, the constitutional provisions and statutes itemized in Nos. 1 through 7 above appear in the Petition for Certiorari, No. 81-2188.

STATEMENT OF THE CASE

This case involves the question of whether the United States District Court for the District of Montana properly exercised its discretion in dismissing seven different cases seeking to have the federal courts adjudicate water rights on and in the vicinity of Montana's seven Indian reservations. The complaints included Indian and other federal reserved water rights, as well as the water rights of the State of Montana and thousands of other parties.

The seven cases were filed over a period of approximately four years. The first complaint was filed by the Northern Cheyenne Tribe on January 30, 1975[3] naming twenty-one defendants and referring to "John Doe" defendants, seeking to quiet title in the Tribe to the waters of Tongue River, Rosebud Creek and their tributaries.

On March 7, 1975, the United States filed its complaint against twenty-four defendants, claiming reserved rights in the same waters for the United States, both as trustee for the Northern Cheyenne Tribe and in its proprietary capacity for other federal reservations.[4] The United States filed an amended complaint, naming more than 1,000 defendants (J. A. 15a). On August 14, 1975, the Northern Cheyenne Tribe likewise amended its complaint naming many additional defendants (J. A. 33a). On motion of the Northern Cheyenne Tribe, the two cases were consolidated on September 4, 1975.

The United States filed its second case on April 17, 1975 on behalf of the Crow Tribe of Indians, and in its proprietary capacity seeking adjudication of all reserved and other water rights in the Big Horn River, Little Big Horn River, Pryor Creek, Sage Creek, Sarpy Creek, Tullock Creek and their tributaries.[5] On August 29, 1975,

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[3]*Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation v. Tongue River Water Users Association, et al.*, No. CV-75-6-BLG, CA-79-4887.

[4]*United States v. Tongue River Water Users Association, et al.*, No. CV-75-20-BLG, CA-80-3040, 80-3041, 80-3042.

[5]*United States v. Big Horn Low Line Canal, et al.*, No. CV-75-34-BLG, CA-80-3062, 80-3063.

the United States filed an amended complaint naming a substantially greater number of defendants—in excess of 1500 (J. A. 47a).

As is obvious from the amendments made to all complaints, the cases were hastily filed, apparently in response to the actions of the Montana Department of Natural Resources and Conservation, which was preparing to initiate comprehensive water adjudication proceedings pursuant to the 1973 Montana Water Use Act, Ch. 452, Laws of Montana (1973), Pet. App. 62, 70.[6] At the time the United States filed its complaints, the Montana legislature had just adopted an amendment to the Montana Water Use Act, MONT. REV. CODE ANN. § 89-874 (1947), Pet. App. 70, effective on July 1, 1975, which authorized petitions to be filed in the state district courts to commence comprehensive adjudication proceedings.[7] Having

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[6]According to Resolution No. 122(75) adopted by the Northern Cheyenne Tribe, on January 23, 1975, and presented as evidence in the oversight hearings on the Montana cases held by the Senate Select Committee on Indian affairs in 1979, the Northern Cheyenne Tribe knew that water rights on the Tongue River drainage would be adjudicated by the State of Montana "within the near future." Senate Select Committee on Indian Affairs, 96th Cong., 1st Sess., *Oversight Hearings on Litigation Involving Water Rights in Montana* (1979) (hereinafter cited as *Oversight Hearings*).

[7]Daniel Old Elk, Chairman of the Crow Tribe Water Resources Commission summarized what precipitated the filing of the Complaints: "In 1975, the Crow Tribe requested the United States to initiate litigation on its behalf as trustee so that what appeared inevitable water rights litigation involving all water users in the drainages of the Crow Reservation would be brought in Federal Court rather than State Court. The 1975 Montana Legislature was obviously then intending to revise the 1973 Montana Water Use Act to provide for immediate State court adjudication of all water users. Although the legislation did pass and the state court actions were initiated by the Department of Natural Resources and Conservation, the United States complied with the Crow Tribe's request and initiated a federal Court action first." *Oversight Hearings* 304.

collected the necessary data regarding existing water rights as required by § 89-871, R. C. M. 1947, Pet. App. 67, the Montana Attorney General filed two petitions in July, 1975 in the state district courts for Yellowstone and Rosebud Counties, seeking orders to initiate the proceedings to adjudicate the rights of persons to the same streams involved in *Tongue River* and *Big Horn* respectively.[8] On August 26, 1975, the District Court for Yellowstone County issued the requested order. No order was ever issued for Rosebud County.

Various parties moved to dismiss the first three federal court actions. Proceedings were stayed pending this Court's decision in *Colorado River Water Conservation District v. United States*, 424 U. S. 800 (1976) [hereinafter cited as *Akin*], holding that water adjudication proceedings in Colorado state courts could include all federal reserved water rights, including Indian reserved water rights, pursuant to the McCarran Amendment, 43 U. S. C. § 666. In September, 1976, the motions to dismiss were briefed and argued in light of *Akin*. Those motions were pending on April 5, 1979, when the United States filed its four additional general stream adjudications, including Indian and other federal reserved water rights.[9]

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[8]See attachments to State of Montana's Motion to Dissolve the Order of Jan. 20, 1976 Staying Proceedings and Motion to Dismiss filed on May 26, 1976, in *United States Tongue River Water Users Association et al.*

[9]*United States v. Aasheim, et al.*, No. CV-79-40-BLG, CA-80-3028, 80-3061 (Poplar River system, Big Muddy Creek, Fort Peck Reservation tributaries to Missouri River) (J. A. 110a); *United States v. Aageson, et al.*, No. CV-79-21-GF, CA-80-3032, 80-3044 (Milk and St. Mary River systems) (J. A. 82a); *United States v. AMS Ranch, Inc., et al.*, No. CV-79-22-GF, CA-80-3045 (Marias River system) (J. A. 133a) and *United States v. Abeli, et al.*, No. CV-79-33-M, CA-80-3038 (Flathead River system)(J. A. 119a).

Like the three earlier suits, the 1979 suits were filed in reaction to the Montana legislature's consideration of proposed amendments to the Montana Water Use Act. The 1979 legislature passed "Senate Bill 76," Pet. App. 102-132, which amended the Montana Water Use Act, effective May 11, 1979 and required immediate state-wide adjudication of all existing water rights, including those reserved by the United States for itself and for the benefit of Indians and Indian Tribes.

During deliberations on Senate Bill 76, various federal and tribal representatives threatened that unless the legislature excluded Indian water rights from the state court adjudication system, the United States and the Tribes would initiate litigation in federal court. In the words of Forrest Gerard, then Assistant Secretary of the Interior for Indian Affairs,

> when it was clear that the legislative committee had made this determination [to include Indian water rights in Senate Bill 76] and that the legislation would be enacted, we asked the Department of Justice to act. Thus, on April 5, 1979, suits were filed to secure a Federal forum for the adjudication of the water rights of the five Northern Montana Indian reservations. *Oversight Hearings* 24.

The United States filed all four suits on behalf of the respective Tribes with the Tribes' express consent.[10] All four suits were hastily prepared and filed by the United States in order that, as the United States has

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[10]See *Oversight Hearings* 35-51 documenting that the Tribes on all seven of Montana's Indian reservations passed resolutions urging the United States to act in their behalf.

admitted, it could obtain a "jurisdictional foothold."[11] Although the complaints named thousands of defendants, there were many water users omitted and many named defendants were deceased. *Oversight Hearings* 114, 135, 144, 188, 220, 442, 507. The federal court stayed all proceedings until service could be completed upon all named defendants.

Various defendants moved to dismiss these four cases. On November 26, 1979, District Judges Battin and Hatfield granted motions to dismiss all seven cases holding that although the district court had jurisdiction over the claims to federal reserved rights, including Indian reserved rights, considerations of "wise judicial administration" as defined in *Akin* required dismissal of the complaints in favor of on-going state-wide water adjudication proceedings.

The United States and the Indian Tribes appealed the order dismissing the cases.[12]

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[11]Memorandum for United States, 11 n. 8, *Jicarilla Apache Tribe v. United States, et al.*, 601 F. 2d 1116 (10th Cir. 1979), *cert. denied*, 444 U. S. 995 (1979).

[12]On June 8, 1976, the Crow Tribe of Indians moved to intervene as a plaintiff in *Big Horn* and *Tongue River*. The motion was never ruled upon. *See* Crow Tribe's complaints in intervention, (J. A. 70a, 76a). On April 10, 1979, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation moved to intervene as a plaintiff in both *Aasheim* and *Aageson*. Intervention was allowed on April 12, 1979, in *Aasheim*, but the motion to intervene was not ruled upon in *Aageson*. *See* complaints in intervention of the Assiniboine and Sioux Tribes (J. A. 150a, 151a). On May 28, 1980, four months after judgment was entered dismissing the United States' complaint in *Abell*, the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation filed a motion to intervene in appeal, which the Ninth Circuit granted on July 24, 1980. Tribes from the Blackfeet, Rocky Boy's and Fort Belknap reservations have never participated in these proceedings.

The Tribes argued, *inter alia,* that Montana's disclaimer provisions barred state jurisdiction over these actions, despite the McCarran Amendment and *Akin.* The Tribes also argued that Montana's failure to follow procedures set forth in Public Law 280, 25 U. S. C. § 1322, rendered the State without jurisdiction. The United States argued, *inter alia,* that even if the Montana courts did have jurisdiction to determine the federal reserved water rights, the district court in any event abused its discretion in dismissing them because the federal forum was the appropriate forum to determine reserved water rights.

The Ninth Circuit Court of Appeals consolidated the appeals for review, and reversed the district court's dismissal of the complaints. The court of appeals held that it was not "wise judicial administration" for the federal district court to dismiss these cases, and that the state courts lacked jurisdiction over Indian water rights because Montana's Enabling Act and Constitution disclaimed jurisdiction over the Indian lands and because Montana had failed to assume jurisdiction over these rights pursuant to Public Law 280, 25 U. S. C. § 1322.

Although the complaints filed by the United States included non-Indian federal reserved water rights, the Ninth Circuit opinion was silent on the question of whether or not the district court properly dismissed those claims in deference to Montana's state court water adjudication proceedings.

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SUMMARY OF ARGUMENT

These cases represent the persistent, concerted efforts by the United States and various Indian Tribes to avoid Montana's comprehensive, state-wide water adjudication procedures, notwithstanding the intent and language of the McCarran Amendment and the specific direction of this Court, in *Akin, supra.*

The Tribes and the United States hastily invoked federal court jurisdiction by filing two groups of cases, each in reaction to, and in anticipation of, state court proceedings in an obvious attempt to obtain a "jurisdictional foothold" in the federal courts and thereby defeat the more organized and comprehensive state proceedings.

The district court evaluated all of the factors in support of retaining jurisdiction and in support of deferring to the more comprehensive on-going state proceedings in Montana. The district court correctly concluded that "considerations of wise judicial administration" required dismissing the piecemeal federal actions.

The Ninth Circuit Court of Appeals' opinion reversing the district court opinion was wrong. It adopted the Tribes' erroneous argument that the disclaimer provision in Montana's constitution barred the state's jurisdiction over Indian reserved water rights; it ignored the plain language of Public Law 280 making that Act inapplicable to water and offered that Act as the only means by which states could assume jurisdiction over Indian water rights; and it refused to recognize that the district court properly applied the *Akin* factors. The Court of Appeals erroneously accepted the argument made by the Tribes, but

expressly rejected by the United States, that conflicts of interest disabled the United States from representing the Tribes in state court proceedings.

The Ninth Circuit's judgment, if not reversed, will wreak havoc with all on-going water adjudication proceedings involving Indian reserved water rights in all of the western states.

ARGUMENT

I. The District Court properly exercised its discretion when it dismissed the complaints even though Montana is a "disclaimer" state, and even though Montana has not complied with procedures in 25 U. S. C. § 1322.

A. Montana's Disclaimer does not bar state court adjudication of federal reserved water rights.

The Enabling Act admitting Montana and three other western states to the Union,[13] 25 Stat. 676, § 4, cl. 2, required that Montana include in its constitution a "disclaimer" to the lands owned by Indians or Indian tribes and an acknowledgment that those lands were to remain "under the absolute jurisdiction and control" of Congress until the title of the Indians or the United States had been extinguished. As required, Montana included such a disclaimer of Indian lands in both its original state Constitution, MONT. CONST. ord. no. 1, cl. 2 (1889), and in its new Constitution, MONT. CONST. art. I (1972).

[13]This Enabling Act included Montana, Washington, North Dakota and South Dakota.

Montana's disclaimer provisions are typical of the western states, most of which have significant federal and Indian lands. Of the twelve states west of the 100th Meridian (including Alaska, but not Hawaii) all but four—California, Oregon, Nevada and Colorado—are disclaimer states. North Dakota, South Dakota and Oklahoma are also disclaimer states.[14] At the back of this brief is a map depicting the disclaimer status of these states, and also showing the extensive federal lands and Indian reservations lying within these states.

The Ninth Circuit in this case drew an unwarranted and unprecedented distinction between disclaimer and non-disclaimer states—a distinction which must be remedied by this Court. This Court has held in *Akin, supra,* that under the McCarran Amendment the Colorado state courts had jurisdiction to decide claims for Indian reserved water rights filed by the United States, and that those claims were properly dismissed by the federal district court in favor of Colorado state court proceedings. Because Colorado is a non-disclaimer state, the Ninth Circuit refused to extend the *Akin* holding to Montana since Montana "unlike Colorado, expressly disclaims jurisdiction over Indian lands within its constitution and enabling act." Pet. App. 31. For the same reason, the Ninth Circuit held that the McCarran Amend-

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[14]Arizona, Idaho, New Mexico, Utah, and Wyoming have enabling acts or constitutional disclaimers essentially identical to the Enabling Act for Montana, North Dakota, South Dakota and Washington. *See* New Mexico and Arizona Enabling Acts, Act of June 20, 1910, 36 Stat. 557; Idaho Const. art. 21, sec. 19, ratified by Congress, 26 Stat. 215 (1890); Wyo. Const. art. 21, sec. 26, ratified by Congress, 26 Stat. 222 (1890); Utah Enabling Act, 28 Stat. 107, 108 (1894). *See also,* Oklahoma Enabling Act, 34 Stat. 267 (1906); Alaska Enabling Act, 72 Stat. 339 (1958), as amended by 73 Stat. 141 (1959).

ment, 43 U. S. C. § 666, cannot have granted jurisdiction to Montana's state forums to adjudicate or administer Indian water rights. *Id.*[15] The Ninth Circuit ignored the fact that when Congress passed the McCarran Amendment in 1952 waiving the sovereign immunity of the United States in general stream adjudications, Congress was continuing its historic deference to state and local water laws. As legislative history for the McCarran Amendment shows, Congress meant the Amendment to include all federal water rights, including those held for Indian tribes.

The Ninth Circuit's holding would limit the effect and force of the McCarran Amendment to only four states in the West despite the fact that the McCarran Amendment was enacted to deal with water adjudication in all western states. S. Rep. No. 755, 82nd Cong., 1st Sess. 2-3 (1951) [hereinafter cited as S. Rep. 755 at 2-3], Pet. App. 148-149.[16] Moreover, the Ninth Circuit opinion contradicts or ignores all previous interpretations of disclaimer language, including its own opinions.

This Court, in a case decided only seven years after Montana's enabling act, held that the "absolute jurisdiction and control of Congress" language in Montana's enabling act could not be construed to constitute *exclusive* federal jurisdiction, but that the restrictive words of the disclaimer related to proprietary interests and *title* to Indian lands. *Draper v. United States,* 164 U. S. 240, 245-246 (1896). This Court also cautioned against interpreting the enabling act in a way that would construe

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[15]As noted above, the Ninth Circuit was inexplicably silent with regard to non-Indian federal reserved water rights. Apparently, those rights are to be adjudicated in state court.

[16]See *infra* part IIA.

Montana's admission to the Union to be unequal to the original states.[17]

Since *Draper*, this Court has explicitly held that disclaimer provisions containing the language "absolute jurisdiction and control" do not "oust the state completely from regulation of Indian 'property'." *Organized Village of Kake v. Egan*, 369 U. S. 60, 71, 75 (1960).

The Tenth Circuit Court of Appeals was the first circuit court to consider whether the *Akin* holding applies to a disclaimer state. In *Jicarilla Apache Tribe v. United States*, 601 F. 2d 1116 (10th Cir. 1979), *cert. denied*, 444 U. S. 995 (1979), the Tribe contended that state court jurisdiction over Indian water claims was barred because of a disclaimer provision in New Mexico's enabling legislation and Constitution. New Mexico's and Montana's disclaimer provisions are alike. *See supra* note 14. The Tenth Circuit exhaustively analyzed disclaimer provisions and their possible effect on state jurisdiction to adjudicate Indian water rights. Consistent with this Court's rulings, the Tenth Circuit held that New Mexico's dis-

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[17]Even if the disclaimer language of the Montana Constitution is a disclaimer of governmental jurisdiction, that jurisdictional bar is no longer in effect for administraton and adjudication of Indian reserved water rights. The Montana Constitution provides that the disclaimer continues in effect "until revoked by the consent of the United States and the people of Montana." Mont. Const. ord. VI (1889), Mont. Const. art. I (1972). The United States gave its consent through the McCarran Amendment. The people of Montana consented to revocation by passage of the Montana Water Use Act. *Cf., Coyle v. Smith*, 221 U. S. 559 (1911), wherein this Court invalidated on equal footing grounds a provision of a state enabling act and upheld a state statute in conflict with the enabling act despite a state constitutional provision irrevocably accepting the provisions of the enabling act.

claimer provisions were "not intended to oust the State completely from regulation of Indian 'property'" because that disclaimer language applied "only to a proprietary interest in such lands." 601 F. 2d at 1133. The Tenth Circuit specifically held that New Mexico's state water adjudication system had jurisdiction to adjudicate all federal reserved water rights, including those waters reserved for use by Indian tribes. 601 F. 2d at 1135.

The Ninth Circuit in this case rejected the interpretations and decision in *Jicarilla*, Pet. App. 35.[18] Moreover, the Ninth Circuit completely ignored the fact that *it* had previously held that proprietary interests only were disclaimed by disclaimer provisions in *White Mountain Apache Tribe v. Arizona*, 649 F. 2d 1274 (9th Cir. 1981). In that case, the Ninth Circuit said: "Enabling Acts themselves forced states to disclaim only their proprietary interest in Indian land, not the states' governmental or regulatory authority over that land." *Id.* at 1280. As authority for that position taken in 1981, the Ninth Circuit cited *Kake, supra*, 369 U. S. at 67-69, and, more significantly, embraced the holding of *Jicarilla*. Only one year later in this case, the Ninth Circuit faulted *Jicarilla* for going "too far" in *its* interpretation of, and reliance on, the subsequent case of *White Mountain, supra*, which was not and could not have been, reviewed by the Tenth

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[18]The Ninth Circuit emphasized, erroneously, that *Jicarilla* was the only case brought to its attention permitting "a disclaimer state to adjudicate a challenge directed against Indian water rights" (Pet. App. 35), implying it was ill-considered because it stood alone. The Ninth Circuit overlooked *State ex rel. Reynolds v. Lewis*, 88 N. M. 636, 545 P. 2d 1014 (1976), cited in *Jicarilla* at 601 F. 2d at 1133, which was also brought to its attention in this case. Brief for Appellees by Cale Crowley at 17-18, Brief for Appellant, Northern Cheyenne Tribe at 34 n. 13.

Circuit in *Jicarilla*. The Ninth Circuit opinion in this case, then, is extraordinary and erroneous. In order to reach the result in this case, the Ninth Circuit ignored its own adherence to *Jicarilla*, overlooked at least one case that was directly on point and rejected this Court's rulings on the effect of such disclaimers.

It is significant that the United States in this case utterly rejects the Ninth Circuit's ruling on disclaimers. After the Ninth Circuit issued its order, the United States filed a Motion requesting a "clarifying" opinion that would evidence that the United States did *not* take the position that because Montana is a disclaimer state *Akin* would not apply. Accordingly, the Ninth Circuit issued a clarifying opinion indicating that only the Tribes made the disclaimer argument. Pet. App. 51-52. In its memorandum on the petition for certiorari in this case, the United States made a persuasive argument that "there is intolerable tension between the rule of *Akin* for non-disclaimer states and the present decision announcing a different rule for disclaimer states."[19] Memorandum for the United States at 13. There, the United States candidly admitted that the position of the Ninth Circuit (and

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[19]The United States has not at all times and in all forums reached this conclusion. *See, e. g.*, Memorandum in Opposition to Defendants' Motion to Dismiss at 30-36, *Northern Cheyenne Tribe of the Northern Cheyenne Reservation v. Adsit, et al., United States v. Tongue River Water Users Assoc., et al.*, CV 75-20-Blg. (7/26/76), in which the United States made the disclaimer argument adopted by the Ninth Circuit. As described above, since *Akin*, the United States has not, in most cases, vigorously asserted the disclaimer argument. *But see*, Brief Amicus Curiae of the State of Washington in Support of Petition for Certiorari, *Arizona, et al. v. San Carlos Apache Tribe of Arizona, et al.*, No. 81-2147, indicating that after the *Adsit* opinion the United States pressed a motion to dismiss state court proceedings which had been in progress more than three years.

the Tribes) on disclaimer provisions would "enervate the [*Akin* decision's] objective," and relegate that decision "to relative insignificance," adding that there is "no apparent justification for different treatment of disclaimer States and other States with Indian Reservations . . . Congress made no policy decision to retain exclusive federal jurisdiction of Indian property in some states, but not in others." *Id.*

The District Court was correct in dismissing the complaints even though Montana has a disclaimer provision. To view the disclaimer as the impediment urged by the Ninth Circuit is contrary to the Ninth Circuit's previous position, contrary to logic, contrary to positions taken by the United States, and contrary to the most relevant and well considered cases dealing with the question of the effect of disclaimers on the McCarran Amendment.

B. The failure to the State of Montana to follow Public Law 280 procedures has no limiting effect on the McCarran Amendment.

More than a year after the McCarran Amendment was passed, Congress passed "Public Law 280," Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. §§ 1322, *et seq.* [hereinafter cited as Public Law 280], for the purpose of facilitating transfers of civil and criminal jurisdiction over "Indian country" to states by providing certain procedures to be followed for such transfers. *Washington v. Confederated Bands and Tribes of the Yakima Nation*, 439 U. S. 463, 490-91 (1979). Pursuant to Public Law 280, Montana has acquired only limited jurisdiction over the Flathead Indian Reservation. Public Law 280, by its language, clearly does not apply to the adjudication of water rights. Even if Montana had assumed jurisdiction over all of its Indian reservations as fully as possible

under Public Law 280, that would have no bearing on its jurisdiction to adjudicate Indian water rights.[20] The relevant part of Public Law 280 states:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian Tribe, band, or community that is held in trust by the United States or shall authorize regulation of the use of such property in a manner inconsistent with any Federal Treaty, agreement, or statute, or with any regulation made pursuant thereto, or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein. 25 U. S. C. § 1322(b).

Despite this clear exclusion of water adjudication from the purview of Public Law 280, the Ninth Circuit held that Montana's failure to follow procedures set forth in Public Law 280 deprived Montana of jurisdiction to adjudicate Indian water by leaving Montana's disclaimer provisions (as interpreted by the Ninth Circuit) intact, barring the exercise of Montana's jurisdiction. Pet. App. 35.

Not only did the Ninth Circuit fail to understand the clear language of Public Law 280, it once again ignored its own previous holding, as well as holdings of this Court, including *Akin, supra*. There, this Court laid to rest the argument that Public Law 280 could be read to limit the McCarran Amendment:

> To be sure, 25 U. S. C. § 1322(b) and 28 U. S. C. § 1360 (b) provide that nothing in those sections "shall con-

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[20]The United States in its Memorandum to this Court says that all parties agree that Public Law 280 offers no such option (for the State to assume jurisdiction otherwise lacking) with respect to Indian Water rights. Memorandum for the United States for Certiorari at 14 n. 20.

fer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [any real or personal property, including water rights, belonging to any Indian or any Indian tribe . . . that is held in trust by the United States]." This provision in both sections, however, only qualifies the import of the gentral consent to state jurisdiction given by those sections. It does not purport to limit the special consent to jurisdiction given by the McCarran Amendment. 424 U. S. at 812-13, fn. 20.

For at least a quarter of a century prior to the present case, the Ninth Circuit had consistently ruled that Public Law 280 had no effect on the areas of the law which were excluded from the statute—the law in those areas remained as it had existed prior to the enactment of Public Law 280.

In *Kirkwood v. Arenas,* 243 F. 2d 863, 865-866 (9th Cir. 1957), the court said that the relevant language "merely negatives the idea that any change in the law as to the alienation, encumbrance, or taxation of Indians' property was intended," and the language in fact is a "reaffirmation of the law as it stood prior to its enactment . . ." *See also Fort Mojave Tribe v. County of San Bernardino,* 543 F. 2d 1253, 1257 (9th Cir. 1976). The law as it stood prior to the enactment of Public Law 280 on the issues here was expressed in the McCarran Amendment, which, as discussed *infra,* Part IIA, would have the federal and tribal water claims adjudicated in the Montana state courts.

More important, this Court has held that the exclusionary language in Public Law 280 "may be read as simply a reaffirmation of the existing reservation Indian-Federal Government relationship." *Bryan v. Itasca County,* 426 U. S. 373, 391 (1976). There this Court cited

Kirkwood, stating "[w]e agree with the Court of Appeals for the Ninth Circuit that Public Law 280 'is entirely consistent with, and in effect is a reaffirmation of, the law as it stood prior to its enactment.' *Kirkwood* . . ." *Bryan, supra,* 426 U. S at 391.

The holding of the Ninth Circuit that a state's failure to follow the procedures set forth in Public Law 280 would bar it from exerting jurisdiction to adjudicate Indian water claims repudiates earlier Ninth Circuit opinions and ignores *Bryan.* Because Public Law 280 excludes the adjudication of water rights, the Ninth Circuit opinion is, simply, wrong.

II. The water rights and adjudications in these complaints should be conducted in the state forum, which has jurisdiction over Indian and other federated reserved water rights.

A. The intent of the McCarran Amendment was to have the water rights such as those in these complaints adjudicated in a state forum together with all other water rights in a state-wide comprehensive adjudication proceeding.

Disclaimer states are included in the McCarran Amendment. The Ninth Circuit ruling has limited the effect of the McCarran Amendment to four western states which do not have the disclaimer language in their enabling acts and constitutions: Oregon, California, Colorado and Nevada.

The McCarran Amendment was enacted by Congress to allow the joinder of the United States as a defendant in state court water adjudication proceedings. Congress recognized that unless it removed the immunity of the United States from suit, state court decrees were ineffective as to the water rights held by the United States:

> if *any* water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or order of, a state court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the state courts. S. REP. 755 at 4-5, Pet. App. 153.

The McCarran Amendment "was introduced for the very purpose of correcting this situation and the evil growing out of such immunity." S. REP. 755 at 5, Pet. App. 153. The problem was significant to the western states (the bulk of which are disclaimer states) because they had adopted the doctrine of prior appropriation and because at least one-third of each western state is federal land. *See,* p. 16, n. 13 of Petition for Certiorari in this case.

The legislative history amply shows that appropriation doctrine states presented forceful testimony in favor of the amendment as much needed in order for their adjudication systems to work effectively. Statement of Merl B. Peek, of the National Reclamation Association, representing the disclaimer states of Arizona, Idaho, Montana, New Mexico, Washington, Wyoming and Utah and other western disclaimer and non-disclaimer states, Hearings Before Senate Subcommittee on the Judiciary for S. 18, 82nd Cong. 1st Sess. 50 (1951) (*infra* at App. 16) [hereinafter cited as *Judiciary Hearings*]. *See also,* S. REP. 755 at 4-5, Pet. App. 152-153.

The legislative history of the Amendment makes equally clear that Congress intended the McCarran Amendment to include all federal water rights, including those reserved rights held by the United States for Indian

tribes. The United States Department of the Interior acknowledged in a letter to Senator McCarran that interests of the United States in waters for or on Indian reservations *were* included in the Act. This letter, included in the Senate Report accompanying the McCarran Amendment, S. Rep. 755 at 8, Pet. App. 159-161, requested that the Act be amended. One of the requested amendments was that the waiver of the sovereign immunity of the United States "*should not extend to rights asserted by the United States for or on behalf of Indians.*" (Emphasis added.) Pet. App. 147 and 161. Although some amendments were made, they did not include that amendment requested by the Department of the Interior, S. Rep. 755, part 2, 82nd Cong. 2nd Sess. § 1-2 (1952), Pet. App. 164-166. As this Court noted in *Akin, supra,* 424 U. S. at 810, Congress' rejection of the proposed amendment was evidence that the McCarran Amendment was to be construed as reaching federal water rights reserved on behalf of Indians.

Furthermore, the hearings relating to the McCarran Amendment included testimony about specific problems facing western states in their water adjudications and administration proceedings. Calling his testimony "the most concrete example of the effect of immunity from suit enjoyed by the United States," W. T. Mathews, Attorney General of the State of Nevada, testified about the plight of his state where, forty-two years after original adjudication proceedings were commenced, Indian water rights were finally removed from Nevada's state court proceedings, *Judiciary Hearings* 44-49, *infra,* at App. 10-13: "The result was . . . that no order of the state court could then determine the controversy so far as the Indian service rights were or are concerned, as it was

and is absolutely immune from court proceedings in the State court, as well as the Federal Court." *Id.* at 48, *infra* at App. 13. This "concrete example", together with the entire legislative history of the McCarran Amendment, forecloses any argument that the McCarran Amendment does not include Indian water rights or the western disclaimer states.

B. Congress, in legislation other than the McCarran Amendment, has consistently shown its intent that state forums be used for the adjudication of all water rights.

Early in the settlement of the West, most western states adopted the doctrine of prior appropriation. Through the years, these states developed their water and court systems to create order in the adjudication of water, "without material aid from our United States Government until a much later time." S. REP. 755 at 3, Pet. App. 148; *Judiciary Hearings* 44, *infra* at App. 2.

As this Court has recognized, whenever Congress has addressed the question of how to fit federal water rights into a state water law system, Congress "has almost invariably deferred to the state law." *United States v. New Mexico*, 438 U.S. 696, 702 (1978). In that case, this Court specifically referred to Hearings on Federal State Water Rights before the Subcommittee on Irrigation and Reclamation, Senate Committee on Interior and Insular Affairs, 88th Cong. 1st Sess., at 302-310, listing "*37 different statutes* in which Congress expressly recognized the importance of deferring to state water law . . ." *Ibid.*, at 702 n. 5. (Emphasis added.)

An early example of Congressional recognition of the need for local and state law to be applied to water

was the Act of July 26, 1866, 14 Stat. 251, which provided in relevant part:

> whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, . . .

That Act was amended by the Act of July 9, 1870, 16 Stat. 217, which provided in relevant part: "All patents granted . . . , shall be subject to any vested and accrued water rights, or rights . . . used in connection with such water rights, as may have been acquired under or recognized by (this section)." These two acts are codified together as 43 U. S. C. § 661.

Another early example of Congress' very conscious deference to western state water systems is the "Desert Land Act" of March 3, 1877, 19 Stat. 377, a forerunner of 43 U. S. C. § 321, which applied to all of the area west of the 100th Meridian (except Alaska). This Act provided that lands should be "patented by the United States separate and apart from the water and that then all the non-navigable water should be reserved for the use of the public *under the laws of the States and Territories named in the Act.*" (Emphasis added.) This Act was discussed during Congress' consideration of the McCarran Amendment. *Judiciary Hearings* 45, *infra* at App. 4-5; S. Rep. 755 at 3, Pet. App. 149-150. Congress in 1951 even went so far as to quote with approval the decision of this Court summarizing Congress' historic deference to state water laws:

> since the passage of the Desert Land Act, [Congress] has repeatedly recognized the supremacy of state law in respect to the acquisition of water for the reclamation of public lands of the United States *and lands of its Indian wards.* (Emphasis added.) *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142, 164 (1935).

S. Rep. 755 at 3, Pet. App. 151, and *Judiciary Hearings* 45, *infra* at App. 7.

In another early act of Congress, the Act of March 3, 1891, 26 Stat. 1095, as amended, 43 U. S. C. § 946, Congress provided for rights-of-way across public lands to be used by "any canal or ditch company formed for the purpose of irrigation." The reclamation was specifically to be controlled by state water law, so that there would be no intereference "with the control of water for irrigation and other purposes under authority of respective states and territories." 26 Stat. 1097. A later amendment, which was made to correct an erroneous interpretation by the Secretary of the Interior, stated that "charges for water coming . . . from reservoir sites used or occupied under the provisions of this Act *shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.* (Emphasis added.) Act of February 26, 1897, 27 Stat. 599. In two later acts, Congress likewise insisted that nothing in those Acts should interfere with state laws relating to the control, appropriation, use or distribution of water, or any vested right acquired thereunder, and that the federal government should proceed in conformity with state laws. Federal Reclamation Act of 1902, 32 Stat. 388, forerunner of 43 U. S. C. § 371, and the Federal Power Act of 1920, 41

Stat. 1068, 60 U. S. C. §§ 802 *et seq.* The following portion of the 1902 Act was especially noted by Congress prior to the enactment of the McCarran Amendment as a "strict admonition to the Secretary of the Interior":

> Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, . . .

S. Rep. 755 at 3, Pet. App. 149; *Judiciary Hearings* 44, *infra* at App. 3. Likewise, in the Flood Control Act of 1944, 58 Stat. 887, 33 U. S. C. § 701, Congress provided that use of water for navigation should be only that use which did not conflict with any beneficial use, present or future, in the western states.

As all these statutes demonstrate, Congress has had a consistent history of recognizing the imperative need for water use and conservation in subordination to local and state water laws and customs. The very conscious intent of Congress in passing the McCarran Amendment was to permit general water adjudication and administration systems such as Montana's to include federal reserved water rights.

The United States and Tribes in these cases now ask this Court to ignore the intent of Congress and revise the McCarran Amendment to suit the Tribes and the United States. As discussed in Part D, *infra,* this Court in *Akin* rejected the same argument when made by the United States. Brief for the United States at 43-45, *Akin, supra.*

C. The Montana Water Use Act meets all requirements of the McCarran Amendment.

1. The Montana Water Use Act

Montana's system will result in a final adjudication of all water rights, unlike the federal suits here.[21]

In 1972, the Montana people adopted a new constitution, emphasizing the special importance historically accorded to water rights in the state, confirming and recognizing first, the continuation of "[a]11 existing rights to the use of any waters for any useful or beneficial purpose." MONT. CONST. art. IX, § 3(1). The Constitution further states that "the legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." *Id.* § 3(4). Responding to this mandate, the Montana legislature passed the Montana Water Use Act in 1973, Ch. 452, L. Mont. 1973, Pet. App. 62-102. That legislation was expanded and perfected by the legislature in 1979 in Ch. 697, L. Mont. 1979, with legislation commonly known as "Senate Bill 76," Pet. App. 102-132.[22]

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[21]Leo Krulitz, then Solicitor of the United States Department of the Interior, testified at the *Oversight Hearings*, "[w]e think the Montana State Legislature probably did a pretty good job in terms of creating and starting stream adjudication in State Court. . . . Certainly in passing that legislation, they were conforming to what federal law [the McCarran Amendment] provided in terms of starting state adjudication." *Oversight Hearings* 55.

[22]The Montana Water Use Act is codified at Chapter 2 of Title 85, *Montana Codes Annotated*, and in Chapter 7, Title 3 of the *Montana Codes Annotated* (1979) [hereinafter cited as M. C. A. 1979)].

The Montana Water Use Act as it existed in 1973 required the Montana Department of Natural Resources and Conservation (hereinafter called Department) to establish immediately a centralized record system of all existing rights and to begin proceedings under the Act to determine existing rights. Pet. App. 67-68. The Department was to gather extensive data to aid in the determination of existing rights, *id.*, and was permitted to specify areas where the determination of existing rights was most urgent for prompt proceedings under the Act. The Act required each person[23] to file a declaration of existing right which included specific information sufficient to document the claim. *Id.* at 68-70. The Department was then to file a petition for a determination of all existing rights in a water source in the state district court of the judicial district in which the water source was located. *Id.* at 70. The courts were to issue a preliminary decree covering all existing rights, *id.* at 71-72, holding hearings as in other civil actions for the purpose of objecting to the preliminary decree, *id.* at 72-73, and issue a final decree on the basis of the preliminary decree and the hearings. *Id.* at 73-74. Appeals from the final decree were permitted. *Id.* at 74-75. The Department then was to issue certificates of water rights to each person based upon the final decree. *Id.* at 75. All of these procedures were for the adjudication of existing water rights.

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[23] "Person" was defined in the Act to mean "an individual, association, partnership, corporation, state agency, political subdivision, and the United States or any agency thereof." Pet. App. 64. The definition was subsequently amended to include "any other entity." Pet. App. 126.

The Act also provided a method for the acquisition of new water rights. After July 1, 1973, no water could be appropriated except as provided in the Act. *Id.* at 75. Any application for new water rights was to be submitted to the Department where it was either granted, denied, or approved with conditions to ensure non-interference with established uses—after notice to all concerned parties and a hearing on the application. *Id.* at 80-82. The Department then would issue its certificate of water right after the actual completion of the appropriation. *Id.* at at 83-84.

Thus, the Act provided for a comprehensive, statewide repository of *all* water rights held by anyone within the State of Montana. All water rights within the State would be evidenced by the Department's certificates of water rights, whether the water rights existed prior to enactment of the Act or were obtained after the Act's effective date.

In response to the 1973 legislation, the Department determined that southeastern Montana presented the most urgent need for comprehensive stream adjudications.[24] The United States and the Northern Cheyenne Indian Tribe reacted by filing suits in the Montana federal district court in anticipation of the Department's actions and in an effort to "beat" the commencement of the state proceedings. *See supra* note 11 and accompanying text.

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[24]See affidavit of Laurence Siroky attached to State of Montana's Motion to dissolve the order of January 20, 1976, staying proceedings and Motion to Dismiss filed on May 26, 1976, in *United States v. Tongue River Water Users Association, et al.*

Senate Bill 76, enacted on May 11, 1979 (Pet. App. 102-132), streamlined the Montana Water Use Act by amending the Act "to expedite and facilitate the adjudication of water rights." Pet. App. 102. This legislation established an independent state-wide court system for the exclusive purpose of adjudicating all water rights, including, by virtue of the McCarran Amendment, federal reserved water rights, reserved both by the United States on its own behalf and on behalf of Indian Tribes. Pet. App. 122. Four water divisions, covering the entire state, were created, each with its own water judge who must appoint a water master, Pet. App. 102, 104, and who may appoint a water commissioner. Pet. App. 106.

Before the improved state adjudication process could continue, the United States, at the request and with the consent of the Indian tribes of the Flathead, Blackfeet, Fort Peck and Fort Belknap Indian Reservations, filed four complaints in federal district court involving thousands of defendants, and Indian and non-Indian federal reserved water rights. *See supra* notes 10 and 11 and accompanying text. Nonetheless, the comprehensive state-wide adjudication provided for in Senate Bill 76 commenced within a month of its enactment. On June 8, 1979, the Montana Attorney General petitioned the Montana Supreme Court for an Order, and the Montana Supreme Court issued its Order, requiring every person asserting a claim to a water right existing prior to July 1, 1973, to file a declaration of that claim with the Department no later than January 1, 1982. Pet. App. 138. The original January 1st deadline for filing claims was later changed by the Montana Supreme Court to April 30, 1982. Pet. App. 140.

As noted by the district court in its Order dismissing the complaints of the United States and Indian Tribes, the Order of the Montana Supreme Court conformed exactly to the form prescribed by Senate Bill 76. Pet. App. 59-60. The United States Attorney for the District of Montana and the Attorney General of the United States were both served with a copy of the Order, and the United States was thus named a defendant in the on-going statewide adjudication. As stated above, on November 29, 1979, the district court dismissed these 1979 cases together with the original three cases filed in 1975 by the United States and the Northern Cheyenne Tribe. Pet. App. 53-61.

Water adjudication throughout the entire state of Montana has continued to proceed according to the terms of the legislation. The Montana Act required that any person claiming an existing right to use water must file a claim to that right by the deadline set by the Supreme Court of Montana (April 30, 1982), or that right will be presumed to be abandoned. M. C. A. § 85-2-226 (1979), Pet. App. 112. An "existing right" is a right to the use of water which would be protected under the law as it existed prior to July 1, 1973, and by definition, therefore, includes reserved water rights, which were protected by law at least since *Winters v. United States,* 207 U. S. 564 (1908).

Senate Bill 76 contained elaborate provisions for notice to all water claimants. Pet. App. 114-115. By April 30, 1982, all Montana water claimants who were not abandoning their rights to water, filed their claims for existing water rights with the Department of Natural Resources and Conservation. Prior to April 30, 1982, the

Bureau of Indian Affairs made protective filings on behalf of all of Montana Tribes. The Confederated Salish and Kootenai Tribes of the Flathead Reservation filed statements of claim after December 14, 1981.[25] Tribes from five of Montana's Indian reservations[26] are negotiating with the Montana Reserved Water Rights Compact Commission established pursuant to Senate Bill 76. M. C. A. § 2-15-21 (1979); Pet. App. 122-124. The statute has suspended the filing deadline for the negotiating Tribes. M. C. A. § 85-2-212 (1981), *infra* at App. 36-37.

The statements of claim to existing water rights were required to set forth information supporting the claim, including date of priority, amount of water claimed, purpose for which the water is claimed and other information necessary to enable the water courts to prepare the preliminary decree. Pet. App. 111-112. By virtue of that requirement, Montana has rapidly acquired a vast storehouse of detailed information from every water claimant on every drainage.

Since the district court dismissed the federal suits, the Montana adjudication process has moved steadfastly forward. Montana is diligently proceeding in its efforts, notwithstanding the potential for these federal cases to

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[25]The circumstances of these filings are described *infra* note 27.

[26]Crow, Fort Belknap, Northern Cheyenne, Fort Peck and Rocky Boy's. Brief of Tribes in Opposition to Certiorari, No. 81-2188 at 4 n. 4.

completely thwart the state adjudication and administration system.[27]

2. The Federal Suits

The contrast between Montana's comprehensive ongoing adjudication proceedings, which will bind all claimants, and the piecemeal federal proceedings is marked. The federal suits are geographically piecemeal. For example, the federal suits omit the main stem of the Missouri River, despite the fact that reserved federal lands lie adjacent to the Missouri River. The river was omitted because it involved thousands of water users and was judged to be too complex and expensive to include in federal proceedings. *Oversight Hearings*, 63, 434. Montana, of course, includes the Missouri River and *all* others in its adjudication.

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[27]There have been efforts by some tribes and the United States to stymie the system while this case has been in the appellate process. The first of these efforts was made on October 21, 1981, by the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation which sought to enjoin the state of Montana and its water courts from applying or enforcing any provision of the Montana Water Use Act, either on the Flathead Indian Reservation or with respect to the waters within or appurtenant to the Reservation. By stipulation with the State, on December 14, 1981, the Tribes agreed to make general filings under the Montana Water Use Act and agreed to a stay of further proceedings until a final determination by this Court in this case. Despite this agreement, the Tribes renewed their request for injunctive relief on July 9, 1982, by a Motion for Summary Judgment. In August, 1982, the district court granted the State's renewed Motion for stay of proceedings.

The United States filed a Petition for a stay of proceedings under the Montana Water Use Act, approximately two weeks prior to the final filing deadline under the Act. Pet. App. 133. The Montana Supreme Court denied the petition because the federal and Indian rights were adequately protected by the Act. Pet. App. 143-144.

The federal cases do not include all water claimants on the streams the complaints do include. *Oversight Hearings,* 114, 135, 144, 188, 220, 442, 507. Montana recognizes "use" rights—water rights which, prior to filings under Senate Bill 76, were unrecorded and unknown.[28] Without the information now available to the State of Montana, the United States and the Indian Tribes must continue to try to identify and name as defendants all water claimants, including those who claim "use" rights. The State has a comprehensive general stream adjudication system which is in effect an *in rem* proceeding. The federal courts have no statutory scheme such as Montana's in place to identify all water users. The federal proceedings are akin to *in personam* proceedings which require service of process upon every claimant. Such a service requirement, of course, is impossible to meet so that any federal decree will never be final. At best, the federal courts will mimic or attempt to duplicate the state's system.

There is already evidence that the federal courts must take advantage of the State of Montana's resources in order to help the United States accomplish these general stream adjudications. In the *Northern Cheyenne, Tongue River* and *Big Horn* cases, the district court ordered the defendant State of Montana (not the plaintiff United

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[28]For descriptions of the inconclusive nature of any adjudication which omits these use rights, see Stone, *Are There Any Adjudicated Streams In Montana?,* 19 Mont. L. Rev. 19 (1957); Stone, *The Long Count On Dempsey: No Final Decision In Water Right Adjudication,* 31 Mont. L. Rev. 1 (1969). The Montana Water Use Act, as amended, provided a system to cure the use right problem through the identification and filing of "use" right claims.

States) to serve all parties with orders of the court and to accomplish publication of notices of the pendency of the cases. Even in the very early stages of those proceedings, the federal court was already putting extraordinary burdens upon the State.

Given the fact that the United States cannot ever identify all water users, and given the piecemeal nature of the proceedings, the federal suits cannot settle the water rights of the United States, the Tribes or other defendants. Because all water rights on a particular drainage are interlocking in nature, *Akin*, at 811 and 819, it is necessary to name all defendants in order to efficiently administer water rights. Those claimants who do not participate in the federal court proceedings cannot be bound by the decree. *Pacific Livestock Co. v. Oregon Water Bd.*, 241 U.S. 440, 449 (1916); *Martinez v. Maverick County Water Control and Improvement Dist. No. 1*, 219 F. 2d 666, 672 (5th Cir. 1955). *See also*, S. REP. 755 at 5, Pet. App. 153. Similarly, if the state proceedings do not include the federal reserved rights and Indian reserved rights, the state decree will not be binding upon the United States and the Tribes, and other participants in the state decree will not be able to rely upon that decree as conclusive against the Indian Tribes and the United States.[29] The

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[29]The United States has acknowledged that "(t)he stated purpose of the Montana Water Use Act to develop and completed a comprehensive state water plan would not reach fruition if federal and Indian claims were not adjudicated along with those claims made by the citizens of this state." Pet. App. 136. The United States has also acknowledged that "(a)ny decree issued which did not include both state and federal claims would always by (sic) subject to challenge by those who did not participate in the adjudication." Pet. App. 136.

inevitable result will be the "chaotic condition" that motivated enactment of the McCarran Amendment. *Id.*

The United States has proposed that this court compound the difficulties facing all parties in these proceedings by excising the Indian reserved rights from both the McCarran Amendment and the *Akin* holding. This proposal would require the United States to amend its complaints, eliminating the non-Indian claims, including those of the United States. The United States does not answer these vexing questions: Against whom will the United States take its judgment? Will all private defendants be dismissed, or will all continue to be doomed to participate in both the federal cases *and* the state court adjudication process? And how could such a decree be enforced? A non-Indian who is not a party to the decree would be helpless to enforce the decree against tribes which abuse their rights. Likewise, tribes would be forced to bring "mini-*Winters*" cases in order to enforce their decreed rights upon those, including the United States in its proprietary capacity, who are not parties to their federal court proceedings.

The Tribes seek to avoid the *Akin* holding by arguing that Montana's disclaimer provision bars state jurisdiction to adjudicate and administer Indian water rights, *see supra* part I A, and that there exists a fatal conflict of intertst between the United States and the Tribes, creating a jurisdictional bar, *infra* part II E. The Ninth Circuit adopted those arguments. If this Court excludes Indian water rights based on the Ninth Circuit's interpretation of Montana's disclaimer language and a "conflict of interest," or if this Court excludes Indian water rights by changing the settled precedent of *Akin*, the result will be the same: dev-

astation to the ability of western states to continue the adjudication and administration of all water rights.

D. This Court's holding in Akin dispensed with arguments that the state proceedings should exclude Indian and other federal reserved water rights.

In *Akin*, the United States had won the "race to the courthouse" by filing an action in federal court for a general stream adjudication, including reserved rights held by the United States in its own right and as trustee for various Indian tribes. This Court upheld the dismissal of the federal action in deference to the state adjudication begun later. *Akin*, 424 U. S. at 806. This Court held unequivocally that "the state court had jurisdiction over Indian water rights under the [McCarran] Amendment." *Akin*, 424 U. S. at 809. In dismissing the complaints in these cases, the district court correctly relied upon that holding. Pet. App. 55 and 60.

The United States now concedes that the *Akin* case would allow Montana's water courts to adjudicate the rights of the Indian and other federal reserved water rights. Memorandum for the United States for Certiorari at 16-17. The United States urges this Court to modify the rule of *Akin* so that Indian reserved water rights can be determined in the federal forum—so long as the claims are filed there in a "timely fashion." *Id.*, at 17. The United States is resurrecting the same argument which was put to rest in *Akin*. It does so under the guise of a request to "clarify" that holding in order to avoid the often "unseemly race to the courthouse followed by often prolonged and intense jurisdictional skirmishing pursued both in state and federal courts." *Id.*, at 16. The United States, of course, is aptly describing the facts of this case where,

as the United States has stated, federal court cases were filed "merely in order to obtain a jurisdictional foothold." *See supra,* note 11 and accompanying text, and part II C. 1.

This case represents a dogged effort by the United States to thwart the operation of state water adjudication and administration statutes. The argument the United States makes here has been made consistently and unsuccessfully by the United States for many years, beginning with the hearings on the proposed McCarran Amendment in 1951 when the Department of the Interior then first urged the exclusion of Indian water rights from the effect of the McCarran Amendment. *See supra* part II A and S. Rep. 755 at 8, Pet. App. 159-161. Then in 1976, in *Akin,* the United States argued that Indian (and other federal) water rights must be determined in the federal forum. At bottom, the United States argued that Indian rights would fare badly in state courts which were hostile and could not comprehend the alien subject of federal reserved rights. Brief of the United States at 44-45, *Akin, supra.* This Court determined otherwise. *Akin,* at 812. Only three years later, in *Jicarilla Apache Tribe v. United States, supra,* the United States urged this Court to either clarify, qualify or reconsider and modify the *Akin* holding so that, at the very least, Indian water rights could be determined in the federal forum. Brief of the United States 11, *Jicarilla, supra.* The persistence of the United States in again making the same losing argument is extraordinary. The argument should be rejected once again.

E. The District Court correctly dismissed the federal cases on the basis of wise judicial administration.

If this Court refuses to tamper with *Akin* or find, as did the Ninth Circuit, that "the limited factual circum-

stances of *Akin* prevent its application to the Montana litigation" (Pet. App. 38-39), then it must also find that the district court correctly held that the Indian water rights could be adjudicated in state court.

In *Akin*, this Court outlined factors existing in that case which warranted dismissal in favor of the state proceedings. *Akin*, 424 U. S. at 820. The district court considered all *Akin* factors in deciding to dismiss these cases. Pet App. 58-61. It concluded that the Montana proceedings are "thorough", "comprehensive and efficient", but that the federal proceedings were piecemeal. Pet. App. 60-61. *See* discussion at Part II C 2, *infra*. The district court considered the stage of the proceedings, concluding that the federal proceedings were in their infancy, with service of process only recently completed. Pet. App. 61. It found that the state forum is geographically more convenient than the federal forum.[30] The District Court seemed to recognize, as *Akin* teaches (424 U. S. at 819), that the McCarran Amendment itself is the most important of the factors counselling against concurrent federal proceedings when there is a comprehensive state proceeding underway. Pet. App. 57-58.

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[30]Six of the federal cases were filed in either the Great Falls or Billings divisions of the federal district court. *Abell*, the only Missoula division case, was tranferred to Judge Hatfield in the Great Falls division. This is in contrast to the more local network of the Montana Water Court. *See* discussion at part II C 1, *infra*. The four water judges are empowered to sit anywhere within their divisions, and may use the court facilities located in each of Montana's 56 counties. M. C. A. §§ 3-5-101, 3-5-111, 3-5-402(3), 3-5-404 and Pet. App. 103. Appeals are to the Montana Supreme Court in Helena as opposed to the Ninth Circuit Court of Appeals in San Francisco, California.

The Ninth Circuit failed to give proper deference to the district court's exercise of discretion in dismissing these cases. Although the Ninth Circuit recognized that the *Akin* decision existed, it accepted arguments made by the Tribes that would enable the Tribes to escape *Akin's* holding. The Tribes argued that the McCarran Amendment does not apply to actions brought by Indian tribes in their own right under 28 U. S. C. § 1362, which grants Indian tribes the right to bring civil actions in federal court. *Infra* at App. 36.

Akin should dispose of the argument that this jurisdictional statute repealed the McCarran Amendment. This Court, in *Akin*, considered the analogous issue of whether the McCarran Amendment repealed 28 U. S C. § 1345, the jurisdictional statute granting federal district courts original jurisdiction over all civil actions brought by the United States except as otherwise provided by Act of Congress. In *Akin*, the United States strenuously argued that 28 U. S. C. § 1345 made the federal forum the proper one for adjudication of federal reserved water rights. Brief of the United States 43-45, *Akin*, *supra*. This Court found that while the McCarran Amendment did not repeal section 1345, there also was "no irreconcilability in the operation of both statutes," and that [t]here is no irreconcilability in the exercise of concurrent state and federal jurisdiction." *Akin*, 424 U. S. at 809. The same reasoning used by this Court in relation to Section 1345, applies to Section 1362. Section 1362 establishes a general jurisdictional grant, as does Section 1345, and the McCarran Amendment establishes a specific jurisdictional grant. Here, as in *Akin*, there is "no irreconcilability" in the exercise of concurrent state and federal jurisdiction.

Petitioners have never argued that the federal court lacks jurisdiction over water cases filed by either the United States Government or Indian tribes. Nor did the district court suggest such a thing. The district court agreed that it did have jurisdiction over these actions. Pet. App. 56. The district court exercised its discretion, bottomed on "wise judicial administration" as *Akin* allows, and concluded that, in light of the McCarran Amendment and its underlying policy of avoiding duplicative litigation, it was appropriate to dismiss the complaints in favor of Montana's proceedings. This discretionary dismissal was a proper one under *Akin*.

In addition to the Section 1362 argument, the Ninth Circuit also erroneously accepted the Tribes' argument that there are conflicts of interest among United States and the Tribes whom it represents. Pet. App. 43-44. Significantly, the United States denies that there is any conflict in its representation of non-Indian federal reserved rights, such as those reserved to national parks and forest lands, and its representation of reserved rights held by the United States on behalf of Indian Tribes. Order clarifying Opinion of the Ninth Circuit, Pet. App. 52; Memorandum of the United States 23, *Adsit*.

The fact is that in these cases, there is no conflict of interest merely because the United States represents both the Tribes and federal agencies. In all of its complaints, the United States has acknowledged the reserved rights of the Tribes it represents, and has acknowledged that those rights predate any reserved or appropriative rights of the United States.

Moreover, the Tribes have not shown that there is government self-dealing here. In cases in which there

apparently were conflicts of interest because of government self-dealing, *Nevada v. United States of America, et al.*, and *Truckee-Carson Irrigation District v. United States of America, et al.*, 649 F. 2d 1286 (9th Cir. 1981), *modified*, 666 F. 2d 351 (9th Cir. 1981), *cert. granted*, 51 U. S. L. W. 3287 (1982), Nos. 81-2245 and 81-2276, the United States has represented to this Court that

> in no other case to our knowledge has the United States acted with regard to Indian interests as it did in the *Orr Ditch* proceedings. In pending water adjudications involving Indian interests, the affected tribe typically intervenes in its own name, or participates actively in the formulation of the government's case on its behalf, so that the situation represented by [the *Orr Ditch*] case cannot be expected to recur. Brief for the United States in Opposition 15.

In every one of the cases filed by the United States here, the Tribes participated actively in the formulation of the government's case. Each Tribe authorized the United States to represent it in litigation involving reserved water rights.[31] The Northern Cheyenne Tribe was the only Tribe to initiate suit in its own behalf. Simultaneously with the filing of its case, it asked the United States to institute an action in the Tribe's behalf, which the United States did.

In every other case in which the Tribes have intervened[32] the complaint in intervention has virtually adopted

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[31] *Oversight Hearings* 37-50. One of the concerns expressed by Senator Melcher, Montana, throughout the hearings was that the Indian Tribes had not authorized the federal suits. *See, e. g., id.* at 35-36. Testimony of federal and tribal officials indicated that the tribes had requested the United States to represent them in water litigation and had ratified the actions of the United States. *Id.*, e. g., 35, 51, 304, 395, 416. See *infra* notes 7 and 10 and accompanying text.

[32] *See*, Memorandum of the Tribe's attorneys in *Oversight Hearings* 416-417.

the complaint of the United States. (J. A. 70a, 76a, 150a.) This demonstrates the complete lack of factual support for the Ninth Circuit's ruling that conflicts of interest exist.

The thrust of the Tribes' argument is that the alleged general conflicts of interest prevent the United States from representing them in *state court*, not that conflicts of interest prohibit the United States from representing any interest of the Tribes regardless of forum. The Tribes' argument, then, is that the United States may represent them in federal court because the Tribes agree they would like to litigate reserved water rights there but that the representation of the United States, their ally and trustee, is not adequate if in state court. We suggest that the conflict of interest argument is not, in fact, based on true conflicts—but upon persistent hope that the alleged conflict will deprive the state courts of jurisdiction over Indian water rights.

The existence of conflicts of interest cannot deprive a court of jurisdiction. At most they can only affect the question of whether all parties to a decree may be bound by it. Here the United States insists that no conflict exists and that it can and does represent itself, and the Tribes.[33] As this Court has recognized, "[T]here can be no more complete representation than that on the part of the United States in acting on behalf of these defendants [Indian Tribes]." *Heckman v. United States*, 224 U. S. 413 (1912).

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[33]Tribes from three Montana reservations, Blackfeet, Rocky Boy's and Fort Belknap, apparently do not question the efficacy of the United States' representation. They have made no attempt to participate in the federal cases.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX TO BRIEF OF PETITIONERS

Excerpts From Hearings Before a Subcommittee of the Committee on the Judiciary United States Senate 82nd Congress, 1st Sess. on S. 18 Pages 44-54 April 25, August 3 and 8, 1951

Statement of W. T. Mathews, Attorney General of the State of Nevada in Support of Senate Bill 18 Entitled "A Bill to Authorize Suits Against the United States to Adjudicate and Administer Water Rights"

To the Honorable the Subcommittee on the Judiciary, United States Senate:

Being advised that the above-entitled Senate bill 18 is now pending in your committee, and being vitally interested in such proposed legislation, in view of the importance thereof to the State of Nevada and the many water users therein, I am desirous of submitting my views thereon.

It has been my privilege to have been closely associated with water right litigation for more than 20 years as deputy attorney general and now as attorney general, and for several years prior thereto as an attorney engaged in private practice. I feel that I am conversant with the many problems arising under the water law of this State and the real necessity of a close coordination of the courts in administering such law in the solution of complex problems in the determination of the rights of water claimants, both as to the adjudication of such rights and the enforcement of the decrees awarding them in order that each water user shall obtain his allotted

amount of water in the order of his seniority and at the time he is entitled thereto.

The right to the use of water by appropriation to beneficial use, rather than the commonly known riparian rights in vogue in a greater part of the United States, had its inception in the Western States early in the settlement of the West, being brought about by arid and semiarid character of such States. The doctrine of "first in time is first in right to the beneficial use of the waters of the streams of such States" first became the law of appropriation by custom and later sanctioned by constitutional and legislative enactment in some 11 of the Western States, including Nevada. Under the law sanctioning the doctrine of "first in time is first in right" vast quantities of land in these States beginning back in the Territorial days was brought under cultivation through the courage and hard work of those who homesteaded or otherwise secured farm and ranch lands and made appropriations of water with which to make such lands productive. Litigation with respect to the water rights developed early in the history of the right to the use of water by appropriation. Down through the years the courts of the respective States marked out the pathway whereby order was instituted in lieu of chaos. Rights were established, and all of this at the expense, trial, and labor of the pioneers of the West without material aid from our United States Government until a much later time when irrigation projects were initiated by Congress through the Department of the Interior and later the Bureau of Reclamation. Even then Congress was most careful not to in any way upset the irrigation and water laws of the Western States. In 1902 Congress

wrote into the Federal Reclamation Act a strict admonition to the Secretary of the Interior. Section 8 of that act, being now section 383, United States Code, reading:

"Vested rights and State laws unaffected: Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowner, appropriator or user of water in, to or from any interstate stream or the waters thereof."

This act of Congress has not, to my knowledge, been repealed. It is a most salutary measure, but in recent years has been sadly ignored in many instances, thereby paving the way for the ultimate disruption of laws and rights acquired thereunder so established years ago by the men and women who had the courage to settle our Western empire.

Anyone who has lived, even for a short while, in our Western States knows that water for irrigation of the lands is the lifeblood of its farmers and ranchers and the failure to receive their vested and/or adjudicated amount of water according to their respective determined rights is fatal to their economic welfare. For this reason, if for no other, the diversity in the jurisdiction of courts, i. e., the jurisdiction of Federal courts as against that of the State courts can and does play

havoc in the administration of the water laws of the State with respect to the equitable diversion and division of the waters of the stream system pursuant to the laws and the degrees of the State court entered thereunder.

In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the plenary control thereof. Such has been and is the law of Nevada. In fact the legislature of this State long ago wrote into the Nevada water law the following provision, being now section 7890, Nevada Compiled Laws 1929: "The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground belongs to the public." Of this statute a most able Federal judge, E. S. Farrington, in the case of *Bergman v. Kearney* (241 Fed., at p. 892), a case arising under the Nevada law and decided March 8, 1917, said: "For years the National Government has consistently recognized and respected rights acquired by appropriation to the use of water. It has conformed to the State statutes regulating the acquisition of unappropriated waters; and when its proprietary interest in the use of running water has come in conflict with that of the individual, it has, like the individual, resorted to the courts for settlement and adjustment."

As long ago as 1877 the Congress in the Desert Land Act of 1877, the same being 19 Statutes at Large 377, chapter 107, severed the water from the land and the effect of such statute was thereafter that the land should

be patented by the United States separate and apart from the water and that then all the nonnavigable water *should be reserved for the use of the public under the laws of the States and Territories named in the Act, one of the States named being Nevada.* [Italics supplied.]

This statute was construed by the Supreme Court of the United States in *California-Oregon Power Co. v. Beaver Portland Cement Co.* (295 U.S. 142), decided April 29, 1935, the Court, inter alia, held:

"1. Following the Desert Land Act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since created out of Territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect to riparian rights should obtain.

"2. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the State of their location.

"3. That the effect of the statute was to sever all waters upon the public domain, not theretofore appropriated, from the land itself, and that a patent issued thereafter for lands in a desert-land State or Territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the

water flowing through or bordering upon the lands conveyed."

In course of the opinion the Court said, at page 162:

"The fair construction of the provision now under review is that Congress intended to established the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the States and Territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced."

And at page 163:

"Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the States affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since created out of the Territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any State,' *Kansas v. Colo-*

rado (206 U. S. 46, 94), the full power of choice must remain with the State."

It is interesting to note what the Court said in a marginal note on page 164:

"In this connection it is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of State law in respect of the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards."

The effect and authority of the foregoing cited case was later well recognized and followed by the Supreme Court in *Ickes v. Fox* (300 U. S. 82), decided February 1, 1937, wherein the Court well said, at page 95:

"The Federal Government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (ch. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the Government title to a parcel of land was not to carry with it a water right; but all nonnavigable waters were reserved for the use of the public under the laws of the various arid-land States. *California Power Co. v. Beaver Cement Co.*, 295 U. S. 142, 162. And in those States, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irri-

gation, becomes, by State law and here by express provision of the reclamation act as well, part and parcel of the land upon which it is applied."

Again the Supreme Court in the late case of *Nebraska v. Wyoming* (325 U. S. 589), decided June 11, 1945, adhered to the holding of the Court in the *California Power Co. v. Beaver case, supra.* So that it is settled law that in the arid Western States the law of appropriation is the law governing the right to acquire, use, administer, and protect the public waters as provided in each of such States.

Beginning in the year 1905 the Legislature of Nevada began the task of enacting into statutory law its water laws, culminating in the water law of 1913, the same now being sections 7890-7978, Nevada Compiled Laws 1929, as amended from time to time. A pamphlet containing such law, including amendments to January 1, 1950, accompanies this statement.

Pursuant to our statutory law, order has been brought out of chaos, vested water rights of years' standing and acquired as far back as the 1860's have been adjudicated and the relative rights to the use of the waters of our stream systems have been established, new rights granted and perfected to the end that a fair, equitable and just division of our public waters has been in the main perfected. For example, the rights of more than 600 water users on the Humboldt River stream system have been determined and the amount of water and time of use thereof of each individual claimant established in the final decree of one of our district courts, a proceeding which required some 15 years of research and court

hearings. After such decree was entered and made final by an appeal to our Supreme Court, there remained and remains the administration of those rights and the enforcement of the provisions of the decree by the office of the State engineer and his assistants, and/or the courts of the State necessitating further proceedings in our courts from time to time. It is with respect to the administration of the decreed water rights in the courts that a major difficulty arises where the United States has acquired one or more of the decreed rights for the use of one or more of its departments. Where such is the case and proceedings are brought by the State engineer or by some interested water user to enforce the provisions of a water decree, the claim in most every case is made that the water right acquired by the United States is immune from any administrative order of the State court, and in some cases immune from administration by the State engineer because of the constitutional immunity of the United States from suit by any person or entity.

It is most clear that where water rights have been adjudicated by a court and its final decree entered that, or where such rights are in the course of adjudication, that court wherein such proceedings are had is the court possessing the jurisdiction to enter its orders and decrees and thereafter to enforce the same by appropriate proceedings. Certainly in the administration of and the adjudication of water rights under State laws that the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights an any stream system, any order or action affecting one right

affects all such rights. All water users on such stream then in practically every case are interested and necessary parties to any court proceedings. It is apparent then that any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments by claiming immunity from suit in or orders of a State court can, does, and will most materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Removal by the United States or its interested department to a Federal court wholly fails to solve the problem. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. Senate bill No. 18 was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

A most concrete example of the effect of immunity from suit enjoyed by the United States and its departments occurred in Nevada in recent years. Beginning about the year 1907 the respective water users on the Quinn River stream system in northern Nevada began an action in the Sixth Judicial District Court of Nevada, in and for Humboldt County, for the purpose of adjudicating the relative water rights of that stream. Such action was brought by such users under the then existing practice. After some 12 years of litigation a final de-

cree of the court was entered on April 9, 1919, settling and adjudicating some 75 separate rights to the use of the water, fixing the priorities, amount of water and the number of acres to which the water was made appurtenant. This particular stream system at the time of the adjudication was not placed under the jurisdiction of the State engineer. The parties to the action were, as to the administration of the relative rights, required to petition the court from time to time for redress of grievances with respect to the use of water. Several years after the entry of the decree the United States through the Bureau of Indian Affairs, Department of the Interior, United State Government, purchased certain lands and water rights on the Quinn River. The water rights, some three in number had theretofore been adjudicated and determined in the aforesaid decree. Down through the years the administration of the rights under the decree became increasingly difficult with the result that in 1947 the Legislature of Nevada amended the water law so as to bring the Quinn River and its decreed water rights within the provisions of the 1913 water law, with the administration of such rights placed within the official duties of the State engineer in order that there would be efficient and lawful division of the water in question. The amendment of the law being known as section 46½ of the 1913 law. This section was again amended at 1949 statutes, page 83. After the 1947 amendment became effective the district court of Humboldt County, pursuant to the amendment and by its order, placed the State engineer in charge of the administration of the decree of that court.

Certain difficulties were encountered in the diversion of the waters in question. Differences of opinion

arose as to the interpretation of the decree, with the result that in May of 1949, the Pacific Live Stock Co. instituted an action in the said district court, numbered 1596, against the Ellison Ranching Co., and all other water users mentioned in the decree and/or their successors in interest for the purpose of settling disputes and controversies that had arisen, requiring further interpretation of the decree. The Carson Indian Agency of the Bureau of Indian Affairs of the United States Department of the Interior, hereinafter called Indian service, as user of the said three water rights and lands purchased by the United States, was made a party defendant by order of the State court. The Indian service was a most necessary party to the determination of the action. Its water rights, or rather the rights of the United States, were and would be affected by the orders of the court, as well as all the other rights. A complete determination was not possible unless all water users were brought before the court due to the interlocking nature of the adjudicated water rights. The Indian service objected to the jurisdiction of the State court, notwithstanding its water rights had theretofore been adjudicated by that court, prior of course to the purchase thereof by the United States, but which nevertheless were and are part and parcel of water rights of the stream system and entitled to no more nor no less consideration than the water right of the poorest rancher there involved.

In July of 1949, upon the direction of the Attorney General of the United States, the action in question was removed from the State court to the District Court of the United States in and for the District of Nevada, in case No. 796, upon the ground that it was an action arising

under the Constitution and laws of the United States in that the United States was made a party to the action and that the United States had not given its consent thereto. Thereafter in December of 1949 the United States district judge held that the United States had not consented to be sued in the action and ordered the action remanded back to the State court. The action as so remanded then lodged in the State court for further proceedings in that court without the Indian service being continued a party therein. The result of the matter was and is that the action has not proceeded further. No order of the State court could then determine the controversy so far as the Indian service rights were or are concerned, as it was and is absolutely immune from court proceedings in the State court, as well as the Federal court.

It is most clearly apparent that such a situation cannot help but result in a chaotic condition. Each water user under the Nevada law is required to pay a graduated fee or tax annually for the services of water commissioners. The commissioners, under the direction of the State engineer, must apportion the water to the decreed users thereof in accordance with their decreed rights, and are required to deny the use of water to any user who at a particular time is not in the priority for the available supply of water. Failure to comply with the lawful orders of the water commissioner subjects the offender to the administrative and penal orders of the court, usually issued in contempt proceedings. If a water user possessing a decreed water right is immune from suits and proceeding in the courts for the enforcement of valid decrees, then indeed will the long years of travail

through which the water laws of our Western States have pased in the earnest endeavor of their proponents to effect honest, fair, and equitable division of the public waters have been in vain.

If such a condition is to continue in the future it will result in a throw-back to the conditions that brought about the enactment of the statutory water laws, i.e., the necessity that the public waters so necessary to the economic welfare of the arid States be allotted in as equitable manner as possible to all users of the available supply thereof. It was said of such laws by the Supreme Court in the case of *Pacific Live Stock Co. v. Oregon Water Board* (241 U.S. 440):

"All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

"Referring to a situation resembling that to which this proceeding is addressed, the Supreme Court of Maine said in *Warren v. Westbrook Manufacturing Co.* (88

Maine, 58, 66): 'To make the water power of economic value, the rights to its use, and the division of its use, according to those rights, should be determined in advance. This prior determination is evidently essential to the peaceful and profitable use by the different parties having rights in a common power. To leave them in their uncertainty—to leave one to encroach upon the other—to leave each to use as much as he can, and leave the other to sue at law after the injury—is to leave the whole subject matter to possible waste and destruction.' In considering the purpose of the State in authorizing the proceeding the Supreme Court of Oregon said in *In re Willow Creek* (74 Oreg., 592, 613, 617): 'To accelerate the development of the State, to promote peace and good order, to minimize the danger of vexatious controversies wherein the shovel was often used as an instrument of warfare, and to provide a convenient way for the adjustment and recording of the rights of the various claimants to the use of the water of a stream or other source of supply at a reasonable expense, the State enacted the law of 1909, thereby to a limited extent calling into requisition its police power. * * * Water rights, like all other rights, are subject to such reasonable regulations as are essential to the general welfare, peace, and good order of the citizens of the State, to the end that the use of water by one, however absolute and unqualified his right thereto, shall not be injurious to the equal enjoyment of others entitled to the equal privilege of using water from the same source, nor injurious to the rights of the public.'"

Senate bill 18 is a step in the right direction. If enacted into law it will serve to remove the immunity of

the United States and its departments from suits and proceedings involving the most important matter of water rights. There can be no good reason why the water rights acquired by the United States for the proprietary and economic use of its departments should acquire any different status from water rights acquired by individuals as their rights are as valuable to them as are those valuable to the United States.

Respectfully submitted.

W. T. MATHEWS, *Attorney General.*

CARSON CITY, NEV., *June 7, 1951.*

Mr. GREEN. We have a further statement by Mr. Merl B. Peek, assistant secretary-manager of the National Reclamation Association, who has requested that it be inserted as part of the record.

Senator WATKINS. That will also be made a part of the record.

(The statement referred to is as follows:)

Statement Before the Senate Committee on the Judiciary by Merl B. Peek, Assistant Secretary-Manager, National Reclamation Association

Supplemental statement of the National Reclamation Association representing water users in the States of Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

The National Reclamation Association concurs fully in the statements made by Mr. Glenn G. Saunders, attor-

ney at law, Denver, Colo., who appeared in our behalf as a witness before the subcommittee on April 25, 1951.

INTEREST OF THE NATIONAL RECLAMATION ASSOCIATION IN S. 18

The water users of the West are concerned lest the adjudication of rights on a given stream, wherein the United States is the applicant or permittee for the diversion and storage of waters, or is in the process of acquiring such rights, can never be finally determined unless consent to suit against the Government be given by the Congress. Inasmuch as State courts in the so-called adjudication States and administrative agencies in the permit States have jurisdiction over determining rights to beneficial use of streams located in the respective States, it would appear only logical that the United States submit to jurisdiction of such courts or administrative agencies for a determination of its rights in behalf of the water users, in the same manner as other appropriators.

The water users of the West are aware that the special advantages or preferences accorded the United States in its acts of a proprietary nature with respect to the appropriation of water on a stream are subject to review and reexamination in a Federal court, even though all water rights in the area have been theretofore fully determined in a State court. Certainly, the prospect of such dual adjudication does not lend itself to, nor permit the full development and use of, such waters.

QUESTIONS INVOLVED IN S. 18

The National Reclamation Association is interested in the following questions:

(1) Shall the United States give consent to suit in a State court for the adjudication of rights to the beneficial use of water of a river system where the United States is the applicant or permittee, or in the process of acquiring rights and is a necessary party to the suit; and

(2) Shall the United States submit to the jurisdiction of State administration of waters of a river system where the United States is an applicant or permittee for the diversion and storage of waters, or is in the process of acquiring appropriative rights.

SUMMARY OF ARGUMENTS

(1) Water rights are rights of beneficial use and are vested property rights.

(2) Under Federal Acts of 1866, 1870, and 1877, the United States irrevocably and unconditionally surrendered its rights to the States to control the use of waters of the streams in the West.

(3) The failure of the United States to submit to the jurisdiction of State courts, or administrative agencies, for the adjudication of appropriative rights of waters of the streams in the West, leaves such State administration over such streams incomplete; and, in fact, jeopardizes such State administration.

(4) Consent to suit by the United States as a defendant in inter-State controversies over the allocation

of waters of a river system is a separate and distinct question, which is not involved in the issues discussed herein.

(5) Use for navigation or the control by the United States over navigable waters in the West is an issue not involved in S. 18.

(*1*) *Water rights are rights of beneficial use and are vested property rights*

There are two well-recognized principles of water law: the common-law doctrine of riparian rights inherited from England, and the appropriation law of the West, which was its common law, founded in the customs and practices of the settlers and uniformly recognized in judicial decisions, constitutions and statutes.

Wells A. Hutchins in his Selected Problems in the Law of Water Rights in the West (Misc. Pub. No. 418, U. S. Department of Agriculture) makes an appropriate statement of these two doctrines:

"The western law of water rights embraces two diametrically opposite principles—the common-law doctrine of riparian rights, and the statutory doctrine of prior appropriation. Under the riparian doctrine, the owner of land contiguous to a stream has certain rights in the flow of water, by virtue of such land ownership. Under the appropriation doctrine, the first user of the water acquires a priority right to continue the use, and contiguity of land to the watercourse is not a factor.

"The right of an owner of land riparian to a stream to use the water of that stream for irrigation on his riparian land, solely by virtue of ownership of the land, has

been upheld by the courts of most of the States lying on the one-hundredth meridian—North Dakota, South Dakota, Nebraska, Kansas, and Texas—and in California, and Washington bordering on the Pacific Ocean. In Oklahoma it has been assumed that the riparian doctrine is in effect, but the right of a riparian owner as against an appropriator of the water of the same stream has not yet been defined by the Supreme Court. Oregon started out with the riparian doctrine, but has practically discarded it; in other words, various decisions—principally early ones—stated that riparian owners had rights to the use of water, but the right has been restricted to actual beneficial use by the statutes and court decisions and has been so construed as to amount to a virtual abrogation of the riparian doctrine except as to various early rights based on beneficial use. In some of the States in which the doctrine is recognized, it has been greatly restricted in application by the court decisions; in others it is of moderate importance; and in still other States it is of real significance, both legally and economically.

"The riparian doctrine has been specifically repudiated in toto in the group of States lying between these eastern and western tiers, viz, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

"The appropriation doctrine has been adopted in all of these 17 Western States. In the States which recognize the riparian doctrine, or at least the existence of some riparian rights—these States have some agricultural areas of considerable and some of scant rainfall—the appropriation system was originally superimposed upon an underlying riparian doctrine; but it should be made clear here, as brought out later in more detail, not

only that the basic riparian doctrine has been modified in greater or less degree in most of these States, but that in several jurisdictions, while recognized as the basis of various existing rights, it has been largely or wholly superseded as to future uses of water by the doctrine of appropriation."

Wiel, Water Rights in the Western States, volume 1, third edition, states that—

"While the California courts started with a Federal title and deduced the law of riparian rights from that, the Colorado doctrine started from a rejection of riparian rights, and deduced a rejection of Federal title from that, since the United States holds its public land like other landowners in this respect."

In general it may be said that the appropriation doctrine is founded upon the principle of beneficial use of water and recognizes that he who is "first in time, is first in right." In *Arizona v. California* (298 U.S. 558 at pages 565-566) the appropriation doctrine is defined thus:

" • • • Under this doctrine, diversion and application of water to a beneficial use constitute an appropriation, and entitle the appropriator to a continuing right to use the water, to the extent of the appropriations, but not beyond that reasonably required and actually used. The appropriator first in time is prior in right over others upon the same stream, and the right, when perfected by use, as deemed effective from the time the purpose to make the appropriation is definitely formed and actual work upon the project is begun, or from the time statutory requirements of notice of the proposed

appropriation are complied with, provided the work is carried to completion and the water is applied to a beneficial use with reasonable diligence. * * * "

The proposition seems to be clear that under either the riparian or appropriation doctrine the only rights which exist in water in its natural state are rights of use.

Wiel, volume 1, section 18, pages 18-19, quotes the following from two California cases:

"It is laid down by our law writers that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use.

"A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property right in the water itself. * * * In regard to the water of the stream, his rights (an appropriator's), like those of a riparian owner, are strictly usufructuary and the rules of law by which they are governed are perfectly well settled."

Mr. Justice Story in the early case of *Tyler v. Wilkinson* (4 Mason 397, 400 241 Fed., case No. 14312) said:

"In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without dimunition or obstruction. But strictly speaking he has no property right in the water itself; but a simple use of it while it passes along."

Applying this principle of the usufructuary nature of a water right to the appropriation doctrine, Mr. Justice Stone in the case of *Arizona v. California* (298 U. S. 558, 56 S. Ct. 848) stated:

"Under this doctrine, diversion and application of water to a beneficial use constitute an appropriation, and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation but not beyond that reasonably required and actually used."

Mr. Hutchins, Selected Problems in the Law of Water Rights in the West at page 27 states:

"The water right which attaches to a watercourse is a right to the use of the flow, not a private ownership of the corpus of the water. This is the case, whether the water right is grounded upon ownership of riparian land or upon the statutory right of appropriation discussed hereinafter. And this right of use is a property right, entitled to protection to the same extent as other forms of property."

(2) Under Federal acts of 1866, 1870 and 1877, the United States irrevocably and unconditionally surrendered its rights to the States to control the beneficial use of waters of the streams in the West

The Western States take the position that under the Federal acts of 1866, 1870 and 1877, the Federal Government irrevocably and unconditionally surrendered or relinquished to the States whatever rights the Government may have had to control the use of the waters of streams in the West. The first of these Federal acts, that of July 26, 1866 (14 Stat. 251) and the second, that of July 9, 1870 (16 Stat. 217), are codified together as section 661, title 43, United States Code, and which read as follows:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or

other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"All patents granted or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section."

The first paragraph of the above quoted section is from the original act of 1866. The second paragraph is from the amendatory act of 1870 and had for its purpose the clarification of the 1866 statute.

The third pertinent Federal act is the so-called Desert Land Law (act of March 3, 1877, as amended, 43 U. S. C. 321), which, after providing for desert land entries, reads as follows:

" • • • *Provided,* however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose

of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing right."

Section 2 and 3 of this 1877 act (19 Stat. 377) further provides:

"SECTION 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this Act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated—

"SECTION 3. That this Act shall only apply to and take effect in the States of California, Oregon, and Nevada and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

Colorado was brought within its terms by the amendatory act of March 3, 1891 (43 U. S. C. 323 and historical note).

The historical background of the acts of 1866, 1870 and 1877, supra, has been related many times. In *Jennison v. Kirk* (98 U.S. 453, 24 L.ed. 240 (1879)), Mr. Justice Field said:

"The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the conditions of miners in the mountains."

With reference to the 1866 act, the Court had this to say:

"It merely recognized the obligation of the Government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system but sanctioned, regulated, and confirmed a system already established to which the people were attached."

A more recent decision, *California Oregon Power Company v. Beaver Portland Cement Company* (295 U. S. 142, 55 S. Ct. 725, (1935)) reviews the conditions in the West which lead to the passage of these three Federal acts as follows (295 U. S. 157-158):

"The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in the process of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation. And this substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from our vocabulary the legend 'Great American Desert' which was to spread in large letters across the face of the old maps of the far West."

In *Atchison v. Peterson* (200 Wall. 507, 22 L. Ed. 414) Mr. Justice Field after referring to the silent acquiescence of the United States in permitting the occupation of the public lands for mining and appropriation of water in connection with those operations said (22 L. Ed. 416, 20 Wall. 507, 513): "This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866."

In *Basey v. Gallagher* (200 Wall. 670, 683, 684:22 L. Ed. 452) Mr. Justice Field again referred to the 1866 act by saying:

"It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that the law may be shown by evidence of the local customs, or by the legislation of the State or Territory, or the decisions of the courts."

In the *United States v. Rio Grande Drainage and Irrigation Company* (174 U.S. 690, 706, 17 S.Ct. 770) it was said: "Obviously by these acts so far as they extended Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow."

In *Gutierres v. Albuquerque Land and Irrigation Company* (188 U.S. 545, 553, 23 S.Ct. 338) the Court held:

"By the Act of March 3, 1877, C. 107, 19th Stat. 377, the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation

and reclamation of desert land, part of the public domain, was granted * * *."

A more recent case is that of California Oregon Power Co. versus Beaver Portland Cement Co. In that case the power company claiming riparian rights sued to enjoin the cement company which had appropriation rights from interfering with the water of Rouge River in Oregon. The court reviewed at length the conditions in the West which lead to the passage of the acts of 1866, 1870, and 1877, and commented upon these acts and the decisions construing them. The decision reached was that the appropriation rights of the defendant were good and hence the injunction could not issue. The court thus summarized its decision (295 U.S. 142, 163, 55 S.Ct. 725):

"What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

The doctrine of the California Power Co. decision has been reiterated in two subsequent opinions of the United States Supreme Court. We quote from *Ickes v. Fox (300 U.S. 82, 95, 57 S.Ct. 412)* wherein it was stated:

"The Federal Government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c.107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting

the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the Government title to a parcel of land was not to carry with it a water right, but all nonnavigable waters were reserved for the use of the public under the laws of the various arid-land States."

This same controversy involving the Yakima project, Washington, came before the United States Court of Appeals, District of Columbia, and a decision was rendered by that court on June 30, 1943. The Secretary of Interior attempted to limit the amounts of water which the farmers could secure under contracts with the Bureau of Reclamation to 3 or 3½ acre-feet per acre and to impose an additional charge if more water was desired. The Secretary had urged that the United States was an indispensable party, but the Supreme Court ruled otherwise holding that the appropriation of water was not for the use of the Government, but, under the Reclamation Act, for the landowners, and that the Government was simply a carrier and a distributor of water with a lien upon the land and the water rights as security to assure the repayment of the cost of construction and maintenance. The United States Court of Appeals (*Fox v. Ickes,* 137 F. (2d) 30) ruled against the Secretary, holding that in the operation of the project he is in the position of a carrier of water to all entrymen under the project and that "he must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington." The appellate court went on to say that "the amount of water to which appellants are entitled by reason of prior appropriations for beneficial use can only

be finally determined by a court in the State of Washington."

In *Brush v. Commissioner of Internal Revenue* (300 U. S. 352, 367, 57 S. Ct. 495, 495, the Court said:

"Many years ago, Congress * * * passed the Desert Land Act * * * by which, among other things, the waters upon the public domain in the arid-land States and Territories were dedicated to the use of the public for irrigation and other purposes."

(3) *The failure of the United States to submit to the jurisdiction of State courts, or administrative agencies, for the adjudication of appropriative rights of waters on streams in the West, leaves such State administration over such streams incomplete, and, in fact, jeopardizes such State administration*

The failure of the United States to submit to the jurisdiction of State courts or administrative agencies of the State to determine the rights of the United States on a river system jeopardizes such State administration, because the United States by bringing an action as plaintiff in a Federal court in effect substitutes this court for a State court and State control.

Particularly is this true in the so-called adjudication States wherein a State court is authorized to adjudicate all rights of use of the waters of a stream in the exercise of a quasi-administrative function. Thus, the United States, by bringing all parties into a Federal court, replaces the State forum for that of the Federal. By the same token, the Federal court is exercising the quasi-administrative function assigned by the State laws to a State court. Such procedure is open to grave abuse wherein the United States

uses the device of instituting a class action permitted under rule 23, Federal Rules of Civil Procedure, which places an unnecessary hardship on the individual water user.

Therefore, we recommend that the proviso beginning on line 10, page 1, S. 18, which permits the right of removal by the United States to a Federal court be stricken from the bill.

(4) Consent to suit by the United States as a defendant in inter-State controversies over the allocation of waters of a river system is a separate and distinct question, which is not involved in the issues discussed herein

We recommend that the following amendment be adopted as a part of S. 18:

"Nothing in this act authorizes or shall be construed as authorizing the joinder of the United States in any suit or controversy in the United States Supreme Court involving the right of States to the use of the water of any interstate stream."

We are concerned only with State administration and control of the waters of the Western States and interstate controversies with respect to such waters are separate issues over which the Supreme Court of the United States has original jurisdiction.

(5) Use for navigation or the control by the United States over navigable waters in the West is an issue not involved in S. 18

We do not here undertake any discussion of the problem of navigation or the control by the United States over

navigable waters of the West. If any who oppose S. 18 desire to do so on this basis, we will meet them on their technical ground by a proper statement after such position has been made clear.

We believe it sufficient at this point to mention that in those States where the highest use of the waters of the streams is for their application to such beneficial uses as the raising of crops and the development of water systems for metropolitan areas, these uses have actually brought about a regulation of the highly variable flows of the mountain-born streams so as to be a real aid to navigation in the lower and better-watered areas of the country. There has been no real conflict from the standpoint of economic development of the country between beneficial appropriated uses and navigation uses, but if there were, there should be an immediate allocation and assignment of any claim by the Federal Government on account of any navigation rights to the higher and more productive beneficial uses upon which the civilization of the 17 Western States has been developed and is utterly dependent.

Constitutional Provisions, Treaties and Statutes Involved

The Enabling Act of Montana of February 22, 1889, 25 Stat. 676, in pertinent part provides:

> An Act • • • to enable the people of • • • Montana • • • to be admitted into the Union on an equal footing with the original states • • • § 4. • • • Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying with-

> in the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; * * *

Montana Constitution, Ordinance No. I (1889) states in pertinent part:

> Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, * * *

Montana Constitution, Article I (1972):

> All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

Montana Constitution, Article IX, Section 3 (1972) states in pertinent part:

> Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

The McCarran Amendment, Act of July 10, 1952, 66 Stat. 560, 43 U. S. C. Section 666:

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances:

Provided. That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. § 1322, Public Law 280:

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the Tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulations of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. § 1324, Public Law 280:

> Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

Act of October 10, 1966, 80 Stat. 880, 28 U. S. C. § 1362:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The Montana Water Use Act, Laws of Montana (1973), Chapter 452 §§ 89-865-899, 89-8-100, 89-8-111, R. C. M. 1947, is reproduced in Pet. App. 62-101.

Senate Bill 76, Laws of Montana (1979), Chapter 697 is reproduced in Pet. App. 102-132. However, two relevant sections of Senate Bill 76 were amended by 1981 Mont. Laws, Ch. 268 §§ 4, 8. They now read as follows:

Section 11:

> Filing of claim of existing water right. (1) A person claiming an existing right, unless exempted under 85-2-222 or unless an earlier filing date is ordered as provided in 85-2-212, shall file with the department no later than June 30, 1983, a statement of claim for

each water right asserted on a form provided by the department.

(2) The department shall file a copy of each statement of claim with the clerk of the district court for the judicial district in which the diversion is made or, if there is a claimed right with no diversion, the department shall file a copy of the statement of claim with the clerk of the district court of the judicial district in which the use occurs.

[§ 85-2-221, M. C. A.]

Section 27:

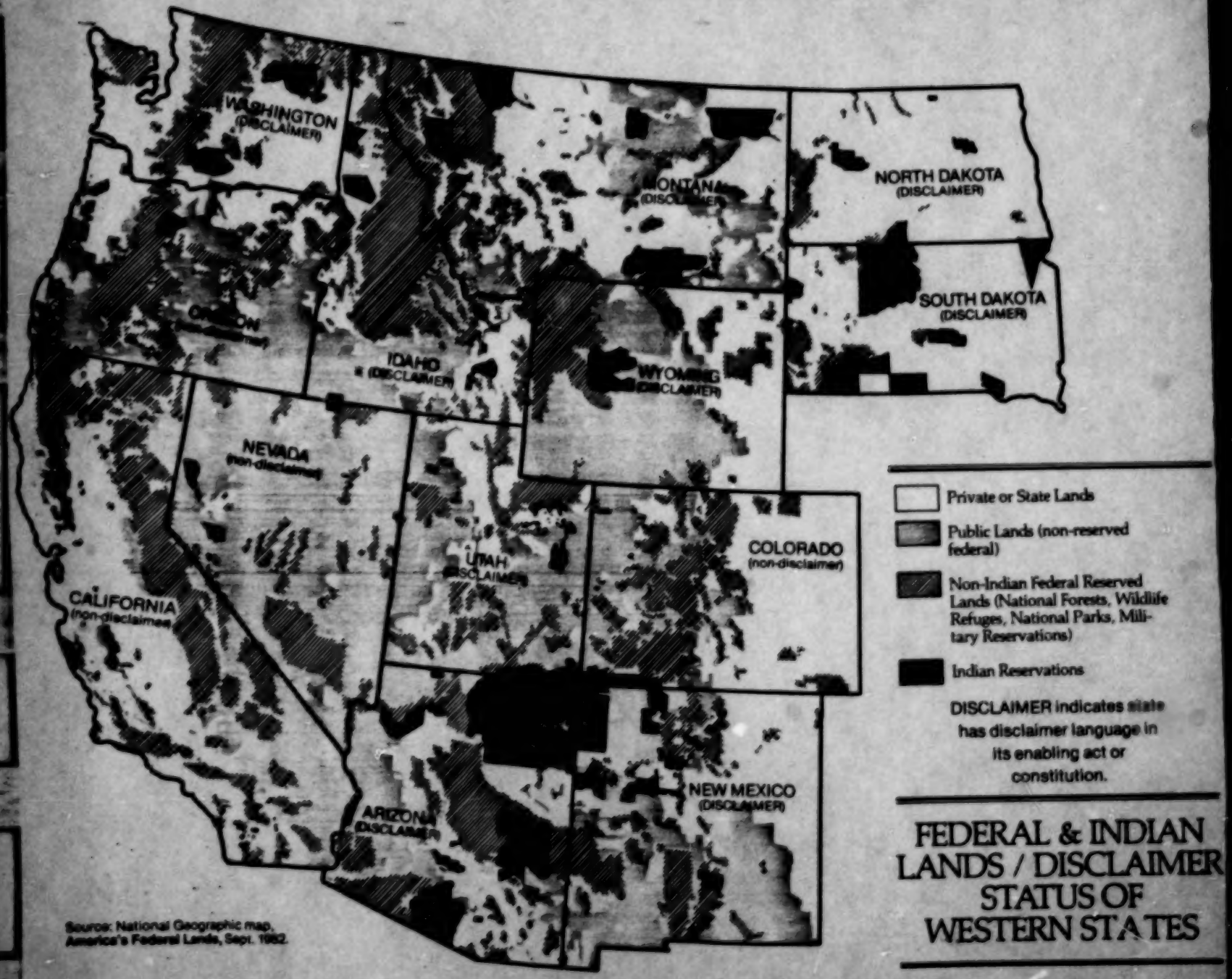
Negotiation with Indian tribes. (1) The reserved water rights compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under 85-2-701. Compact proceedings shall be commenced by the commission. The commission shall serve by certified mail directed to the governing body of each tribe a written request for the initiation of negotiations under this part and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Upon receipt of such written designation from the governing body of a tribe, compact negotiations shall be considered to have commenced.

(2) When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana, any affected tribal governing body, and the congress of the United States.

(3) Upon its approval by the Montana legislature and the tribe or federal agency, the terms of a compact must be included in the preliminary decree

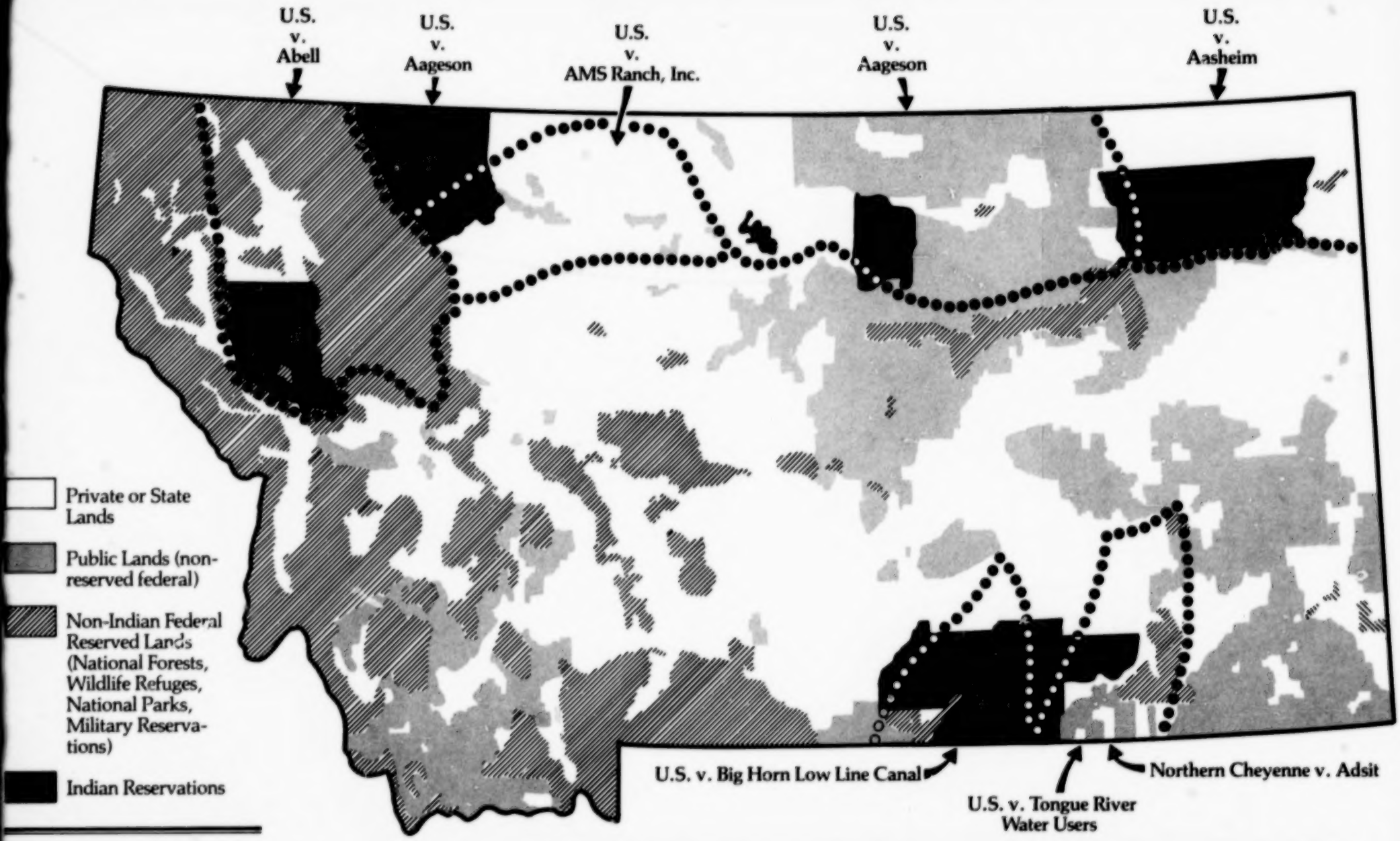
as provided by 85-2-231. However, if approval of the state legislature and tribe or federal agency has not been accomplished by July 1, 1985, all federal and Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within 60 days. These new filings shall be used in the formulation of the preliminary decree and shall be given treatment similar to that given to all other filings.

[§ 85-2-702, M. C. A.]



FEDERAL & INDIAN LANDS / DISCLAIMER STATUS OF WESTERN STATES

Source: National Geographic map, America's Federal Lands, Sept. 1982.


U.S. v. Abell
U.S. v. Aageson
U.S. v. AMS Ranch, Inc.
U.S. v. Aageson
U.S. v. Aasheim
Private or State Lands
Public Lands (non-reserved federal)
Non-Indian Federal Reserved Lands (National Forests, Wildlife Refuges, National Parks, Military Reservations)
Indian Reservations
U.S. v. Big Horn Low Line Canal
U.S. v. Tongue River Water Users
Northern Cheyenne v. Adsit

Source: National Geographic map, **America's Federal Lands**, Sept. 1982.

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Map by Greg Si